MICHIGAN SUPREME COURT

Office of Public Information

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FOR IMMEDIATE RELEASE

CHILD'S SEX ABUSE STATEMENTS AT ISSUE IN CASE BEFORE MICHIGAN SUPREME COURT IN ORAL ARGUMENTS THIS WEEK
Adult's questions, listing of men's names elicited child's responses; were statements "spontaneous and without indication of manufacture" to allow admission of her statement under "tender years" exception to hearsay rule?

LANSING, MI, March 8, 2010 – A man convicted of sexually abusing his girlfriend's six-year-old daughter is challenging that verdict in a case that the Michigan Supreme Court will hear in oral arguments this week.

In *People v Gursky*, the defendant contends that testimony by a friend of the girl's mother should not have been admitted into evidence. The friend testified at trial that she questioned the girl about the abuse and suggested the names of potential assailants, including the defendant's. The child became upset and said "Yes" when the defendant's name was mentioned, and pointed to her vaginal area and said "Down there," according to the friend. The friend's testimony was admitted into evidence under Michigan Rule of Evidence 803A, the "tender years" exception to the hearsay rule. The defendant argues that the child's statement was not "spontaneous and without indication of manufacture," as required by MRE 803A, and so should not have been admitted.

Also before the Court is *Pellegrino v AMPCO Systems Parking*, in which the defendant seeks reversal of an over $15 million verdict, and a new trial, in a case involving the death of one person and serious injury of another in an auto accident. At trial, the defendant sought to excuse an African-American woman from serving on the jury, but the plaintiff's counsel objected that the challenge was racially motivated. Although defense counsel provided race-neutral reasons for removing the juror – she had, during jury selection, stated that she had an inheritance from her mother and thought that the accident victim's children should also have a legacy – the trial judge denied the challenge, stating that he wanted to have a racially balanced jury. Although the Court of Appeals found that the trial judge erred by denying the peremptory challenge, the appellate panel held 2-1 that the error was harmless and did not affect the outcome of the trial. The majority also concluded that the trial judge did not violate court rules that forbid racial and other forms of discrimination during jury selection. The dissenting judge would have granted reversal of the verdict and a new trial before a different judge.

The remaining eight cases before the Court include criminal, defamation, family, insurance, and property law issues.

Court will be held on **March 9 and 10** in the Supreme Court's courtroom on the sixth floor

of the Michigan Hall of Justice in Lansing. Oral arguments will begin each day at **9:30 a.m**. The Court's oral arguments are open to the public.

Please note: the summaries that follow are brief accounts of complicated cases and may not reflect the way that some or all of the Court's seven justices view the cases. The attorneys may also disagree about the facts, the issues, the procedural history, or the significance of their cases. Briefs in the cases are online at http://www.courts.michigan.gov/supremecourt/Clerk/MSC_orals.htm. For further details about the cases, please contact the attorneys.

Tuesday, March 9
Morning Session

UNIVERSITY OF MICHIGAN REGENTS, et al. v TITAN INSURANCE COMPANY (case no. 136905)
Attorney for plaintiffs University of Michigan Regents and University of Michigan Health System: Ronni Tischler/(248) 945-1040
Attorney for defendant Titan Insurance Company: Mark D. Sowle/(248) 338-2290
Attorney for amicus curiae Auto Club Insurance Association: James G. Gross/(313) 963-8200
Attorney for amicus curiae Insurance Institute of Michigan: Mary Massaron Ross/(313) 983-4801
Attorneys for amicus curiae Coalition Protecting Auto No-Fault: George T. Sinas/(517) 394-7500, Liisa R. Speaker/(517) 482-8933
Attorney for amicus curiae Michigan Department of Community Health: James P. Delaney/(313) 456-0280
Attorney for amicus curiae Michigan Assigned Claims Facility: Ann M. Sherman/(517) 373-6434
Attorney for amicus curiae Michigan Association for Justice: Steven A. Hicks/(517) 881-5564
Trial Court: Washtenaw County Circuit Court
At issue: In *Cameron v ACIA*, 476 Mich 55 (2006), the Michigan Supreme Court held that, under the one-year-back rule of MCL 500.3145(1), recovery of no-fault personal injury protection benefits is limited to losses incurred during the one-year period before commencement of the action. MCL 600.5821(4) exempts the state and its political subdivisions from statutes of limitations where the state or its agencies seek to recover costs for the maintenance, care, and treatment of persons in state institutions. In *Liptow v State Farm Mutual Automobile Ins Co*, 272 Mich App 544 (2006), the Court of Appeals held that MCL 600.5821(4) does not supersede the no-fault act's one-year-back rule in MCL 500.3145(1). Were *Cameron* and *Liptow* correctly decided? In this case, an insurer was assigned to service the claims of an uninsured man injured in a car accident – more than one year after the injured man was discharged form the University of Michigan Health Care System, which bore the cost of his care. May the University of Michigan recover those costs, despite the one-year-back rule?
Background: On March 17, 2000, Nicholas Morgan was severely injured as a passenger in a single vehicle accident. Neither the driver nor Morgan had no-fault insurance coverage. Morgan received medical care from the University of Michigan Health System from March 18-23, 2000. Almost a year after the accident, Morgan filed an application for no-fault benefits through the

Assigned Claims Facility. Because Morgan was not covered by any no-fault insurance policy, the Assigned Claims Facility assigned Titan Insurance Company as the servicing insurer for Morgan's claims – but not until March 29, 2001, more than a year after Morgan's discharge from the University of Michigan Health System.

The University of Michigan plaintiffs filed this lawsuit, seeking payment from Titan Insurance for Morgan's medical treatment. According to the plaintiffs, the cost of Morgan's hospitalization was $69,957.19. Titan Insurance filed a motion to dismiss, arguing that the plaintiffs' claim was barred by the one-year-back provision in MCL 500.3145(1). In *Cameron v ACIA*, 476 Mich 55 (2006), the Michigan Supreme Court interpreted MCL 500.3145(1) and held that, under the one-year back rule, recovery of no-fault personal injury protection benefits is limited to losses incurred during the one-year period preceding commencement of the action. In response, the University of Michigan plaintiffs cited MCL 600.5821(4). That statute provides that the state and its political subdivisions are exempt from statutes of limitations when seeking to recover costs expended for the maintenance, care, and treatment of persons in state institutions. MCL 600.5821(4) supersedes MCL 500.3145(1), the plaintiffs contended. But the trial court granted Titan Insurance's motion and dismissed the plaintiffs' complaint with prejudice. The trial court based its decision on *Liptow v State Farm Mutual Automobile Ins Co*, 272 Mich App 544 (2006), in which the Michigan Court of Appeals held that MCL 600.5821(4) does not toll the one-year-back rule of MCL 500.3145(1).

In an unpublished split per curiam opinion, the Court of Appeals affirmed the trial court's dismissal of the plaintiffs' complaint, with the majority holding that it was bound by the prior decision in *Liptow*. The dissenting judge concluded that *Liptow* was wrongly decided. The plaintiffs appealed to the Supreme Court. Leave to appeal was first denied, with three justices dissenting. The plaintiffs filed a motion for reconsideration and, on reconsideration, the Supreme Court granted leave to appeal.

PEOPLE v HOUTHOOFD (case nos. 138959 and 138969)
Prosecuting attorney: Patrick O. Duggan/(989) 790-5330
Attorney for defendant Tod Kevin Houthoofd a/k/a Todd Kevin Houthoofd: Michael Skinner/(248) 693-4100
Trial Court: Saginaw County Circuit Court
At issue: While awaiting trial in an Arenac County jail, the defendant allegedly threatened one of the prosecution's chief witnesses and solicited a cellmate to kill the victim. As a result, the defendant was charged with witness intimidation and solicitation to commit murder. He was tried in Saginaw County on these two charges, plus one other, and was convicted as charged. The Court of Appeals vacated the defendant's solicitation to commit murder conviction, finding that venue was not proper in Saginaw County because the defendant did not commit any acts in perpetration of the offense in Saginaw County. The appellate court affirmed the defendant's other convictions. Both the prosecutor and defendant appeal. Was venue was properly laid in Saginaw County as to the solicitation to commit murder and witness intimidation charges? Is the defendant entitled to retrial on the other two charges if his conviction for solicitation to commit murder is not reinstated? Did the trial court commit errors in admitting evidence or at sentencing that warrant relief?
Background: Tod Houthoofd was in the Arenac County jail on a charge of receiving and concealing stolen property. The items were taken from a store in Saginaw County, but recovered at Houthoofd's home in Arenac County. Soon after, the Saginaw County prosecutor charged Houthoofd with receiving property under false pretenses. The Arenac County prosecutor dropped

his charge in favor of the Saginaw proceeding. While Houthoofd was still in the Arenac County jail, he allegedly solicited another prisoner to kill the Saginaw County store owner. He also allegedly phoned and threatened an Arenac County police detective, whose work had led to Houthoofd's arrest and who was a key prosecution witness.

The Saginaw County prosecutor charged Houthoofd with intimidating a witness and obstructing justice, for the statements made to the detective, and solicitation of murder. The Saginaw County trial court ordered that those charges, plus the false pretenses charge, would be tried together. A jury convicted Houthoofd on all three charges. The trial court denied Houthoofd's motion for a new trial; the court sentenced Houthoofd to prison terms of five to 10 years for the false pretenses conviction, and 10 to 15 years for witness intimidation. On the solicitation of murder conviction, the court exceeded the sentencing guidelines and sentenced Houthoofd to 40 to 60 years. In an unpublished opinion, the Court of Appeals affirmed Houthoofd's convictions for false pretenses and witness intimidation, but vacated the solicitation of murder conviction. Under MCL 762.8, the Court of Appeals noted, venue is proper in any county where "an act culminating in the charged offense occurred or, in cases where the essential conduct elements of the charged offense are defined in terms of their effects, the effects of that conduct are felt." Trial could be held in Saginaw County on the witness intimidation charge because Houthoofd's actions were "intended to affect proceedings pending in Saginaw County," the Court of Appeals stated. But it was improper, the appeals court held, to try Houthoofd in Saginaw County on solicitation of murder because Houthoofd committed no acts in perpetration of that offense in Saginaw County.

Both Houthoofd and the prosecutor appeal to the Supreme Court. The prosecutor seeks reinstatement of Houthoofd's solicitation of murder conviction, arguing that venue was proper in Saginaw County. Houthoofd contends that the witness intimidation conviction must also be vacated because the Saginaw County venue was improper. He also claims that the trial court's evidentiary rulings, and alleged misconduct by the prosecutor, denied him a fair trial. Houthoofd also maintains that the trial court made sentencing errors.

PEOPLE v GURSKY (case no. 137251)
Prosecuting attorney: Joshua D. Abbott/(586) 469-5350
Attorney for defendant Jason Michael Gursky: Peter Jon Van Hoek/(313) 256-9833
Attorney for amicus curiae Prosecuting Attorneys Association of Michigan: William M. Worden/(517) 543-4801
Trial Court: Macomb County Circuit Court
At issue: The defendant was charged with four counts of first-degree criminal sexual conduct for allegedly abusing his girlfriend's six-year-old daughter. A friend of the child's mother questioned the girl about the abuse and suggested the names of potential assailants, including the defendant's. The child became upset and said "Yes," when the defendant's name was mentioned, and pointed to her vaginal area and said "Down there," according to the friend. The friend's testimony was admitted into evidence under Michigan Rule of Evidence 803A, the "tender years" hearsay exception. Was the child's statement "spontaneous and without indication of manufacture," as required by MRE 803A? If the testimony was admitted in error, is it more probable than not that any error determined the outcome?
Background: Jason Gursky was charged with four counts of first-degree criminal sexual conduct for his alleged abuse of his girlfriend's six-year-old daughter. The prosecution's witnesses at trial included the child, her mother, and Stacy Morgan, a friend of the child's mother. According to Morgan, a few days after the child had allegedly been abused, Morgan

asked the child whether anyone had been touching her; the child had a horrified look on her face and began to cry. As she questioned the child, Morgan said, she began listing "every man's name that could come to mind, the last of which was Jason." When the child heard Gursky named, she began crying, said "Yes" and "pointed down to her vaginal area and said, 'Down there,'" according to Morgan. On further questioning, the child provided more details about the abuse, Morgan testified.

Hearsay – an out-of-court statement that is offered in court as proof of the matter asserted in the statement – is generally not admissible, except as provided in the rules of evidence. Under Michigan Rule of Evidence 803A – the "tender years" exception to the hearsay rule – a statement that corroborates the declarant's own testimony about a sexual act may be admitted into evidence if (1) the declarant was under the age of 10 when the statement was made; (2) the statement is shown to be "spontaneous and without indication of manufacture"; (3) the declarant made the statement immediately after the incident or after an excusable delay; and (4) the statement is introduced through the testimony of someone other than the declarant. The trial judge admitted Morgan's testimony into evidence under MRE 803A. The jury convicted Gursky as charged, and he was sentenced to 15 to 30 years in prison.

On appeal, Gursky argued that the trial court erred in admitting Morgan's testimony. He disputed that the child's statements to Morgan were "shown to have been spontaneous and without indication of manufacture" within the meaning of MRE 803A, and argued that he was entitled to a new trial. In an unpublished per curiam opinion, the Court of Appeals affirmed Gursky's convictions. The panel described Morgan's testimony, noting that the "victim responded emotionally to the first mention of the subject matter . . . [and] willingly gave details that exceeded the scope of Morgan's inquiry." On the whole, the panel concluded, "the victim's statements were primarily spontaneous, despite being prompted by Morgan's questions." The testimony was therefore admissible under MRE 803A, the appellate court found. Gursky appeals.

Afternoon Session

PELLEGRINO v AMPCO SYSTEMS PARKING (case no. 137111)
Attorney for plaintiff Anthony Pellegrino, Individually and as Personal Representative of the Estate of Shirley Ann Pellegrino: Heather A. Jefferson/(248) 355-5555
Attorney for defendant AMPCO Systems Parking: John P. Jacobs/(313) 965-1900
Attorneys for amicus curiae State Bar of Michigan: Candace A. Crowley/(517) 346-6319, Clifford T. Flood/(517) 346-6383
Attorney for amicus curiae Michigan Defense Trial Counsel: James E. Brenner/(313) 965-8814
Attorney for amicus curiae Michigan Civil Rights Commission and Michigan Department of Civil Rights: Daniel M. Levy/(313) 456-3812
Trial Court: Wayne County Circuit Court
At issue: This case arises from an automobile accident in which one person was killed and another was injured. A jury trial resulted in a combined judgment of more than $15 million. The defendant argues that the trial judge improperly denied its peremptory challenge of an African-American juror during voir dire; the trial judge stated that he wanted to have a racially balanced jury. MCR 2.511(F) states that "[n]o person shall be subjected to discrimination during voir dire on the basis of race, color, religion, national origin, or sex." Subsection (2) of the court rule provides that "[d]iscrimination during voir dire on the basis of race, color, religion, national origin, or sex for the purpose of achieving what the court believes to be a balance, proportionate,

or representative jury in terms of these characteristics shall not constitute an excuse or justification for a violation of this subsection." Was MCR 2.511(F)(2) violated? Is the defendant entitled to a new trial?

Background: Anthony and Shirley Pellegrino were seriously injured in 2003 while in a shuttle van that was taking them to the lot where their car was parked outside Detroit Metro Airport. The driver, an employee of AMPCO Systems Parking, lost control of the van on an icy roadway and struck a cement barrier. Shirley Pellegrino died as a result of her injuries; her husband Anthony survived, but was seriously injured. Anthony Pellegrino, on his own behalf and as representative of his wife's estate, sued AMPCO. AMPCO admitted liability at trial, so the only issue in dispute was the amount of damages that should be awarded to the plaintiffs. The jury awarded $8,400,000 to Shirley Pellegrino's estate and $6,500,000 to Anthony Pellegrino; with costs and interest, the judgment totaled $15,613,960.48.

AMPCO filed five post-judgment motions, including a motion for a new trial based on alleged irregularities in the proceedings. The trial court denied the motions, and AMPCO appealed to the Court of Appeals. Among other things, AMPCO argued that the trial court erred when it disallowed AMPCO's peremptory challenge of juror Sylvia Greene, an African-American. At trial, when AMPCO's counsel used its peremptory challenge to remove Greene from the jury, the Pellegrinos' counsel objected, citing the U.S. Supreme Court's decision in *Batson v Kentucky*, 476 US 79 (1986). *Batson* prohibits racially motivated challenges to a jury's composition. AMPCO stated its reasons for challenging Greene, maintaining that she had shown bias – for example, by stating that she had an inheritance from her mother and thought Shirley Pellegrino's children should have an estate from their mother. But the Pellegrinos' counsel objected that AMPCO's challenge was racially motivated. The trial court did not analyze the issue under *Batson*, but disallowed AMPCO's peremptory challenge; the trial court stated that its goal was to have a jury that reflected Wayne County's racial composition.

AMPCO appealed, but in an unpublished per curiam opinion, the Court of Appeals affirmed the verdict. While all the judges on the panel concluded that the trial court had made a number of errors, two of the judges concluded that the errors did not require reversal or a new trial. On the issue of AMPCO's peremptory challenge to Greene, the panel noted that the trial court had not analyzed the challenge as outlined in *Batson*: "Under *Batson*, there is a three-step process to determine whether a challenger has improperly exercised peremptory challenges. First, the opponent of the challenge must make a prima facie showing of discrimination based on race. *Id.* at 93-97. Once the prima facie showing is made, the burden then shifts to the challenging party to come forward with a neutral explanation for the challenge. *Id.* at 97. Finally, the trial court must decide whether the opponent of the challenge has proven purposeful discrimination." But despite the trial court's deficient *Batson* analysis, "no *Batson* error occurred because the trial court disallowed plaintiff's peremptory challenge of juror Greene and she was therefore not dismissed from the jury," the appellate panel said. "Despite the trial court's apparent rejection of plaintiff's *Batson* challenge, however, the trial court did disallow defense counsel's peremptory challenge of juror Greene. The question is therefore what is the appropriate remedy for the trial court's denial of defendant's peremptory challenge?"

On that question, the Court of Appeals split, with two judges finding that the trial court's error was harmless. While the remedy for denial of a peremptory challenge is reversal, the Michigan Supreme Court has held that a harmless error analysis should apply, the judges noted. Where the only issue was damages and the verdict was unanimous, it was "highly likely" that, if AMPCO's counsel had excused Greene, the replacement juror would have joined the jury's unanimous verdict; therefore, the error was harmless, the majority reasoned. The Court of

Appeals majority also concluded that the trial court's actions did not violate MCR 2.511(F), which states that "[n]o person shall be subjected to discrimination during voir dire on the basis of race, color, religion, national origin, or sex." Subsection (2) of the court rule provides that "[d]iscrimination during voir dire on the basis of race, color, religion, national origin, or sex for the purpose of achieving what the court believes to be a balanced, proportionate, or representative jury in terms of these characteristics shall not constitute an excuse or justification for a violation of this subsection." The appellate majority concluded that, to "the extent that the trial court desired a racially balanced jury, such a desire does not run afoul of MCR 2.511(F)(2)." The trial court's desire to achieve a racially balanced jury did not constitute "discrimination," the majority concluded, stating "If anything, the trial court's statements permit the inference that the trial court may have acted to protect minority jurors from being excused peremptorily and thus to prevent discrimination based on race."

The dissenting Court of Appeals judge concluded that the trial court had made many errors, including errors in the jury selection process, which required reversal of the verdict and a new trial before a different judge. Noting the trial court's "complete and utter failure to follow *Batson*," the judge said that AMPCO's counsel had provided race-neutral reasons for excluding Greene from the jury: "The record clearly evidences that juror Greene was objectionable. Juror Greene indicated that plaintiffs' counsel's mentioning of a jury award of $10 million, "it clicked into my mind [something] about my mom and how I appreciated [the money she left me]." In addition, Greene has been in an auto accident as a child, had a husband who died in an auto accident, and "had witnessed other horrific automobile accidents. It is difficult to imagine a more biased juror to decide a personal injury and wrongful death action involving a vehicle accident," the judge wrote. Moreover, the trial judge had also stated that he would refuse to follow MCR 2.511 unless ordered to do so, the dissenting appellate judge said. "For a trial judge to state on the record that he refuses to follow the law and will continue to do so unless removed from office does more than imply prejudice in the proceedings, it admits them," the Court of Appeals judge wrote. AMPCO appeals.

SMITH v ANONYMOUS JOINT ENTERPRISE, et al. (case nos. 138456-8)
Attorneys for plaintiff Derith Smith: Mark Granzotto/(248) 546-4649, Grant W. Parsons/(231) 929-3113
Attorney for defendant Donald Barrows: Rosalind H. Rochkind/(313) 446-5522
Attorney for defendant John Stanek: Deborah A. Hebert/(248) 355-4141
Defendant pro per Noel Flohe: Noel Flohe/(231) 946-0011
Attorney for amicus curiae Print, Broadcast, and Electronic Media: Mary M. Mullin/(734) 213-3625
Trial Court: Leelanau County Circuit Court
At issue: When the plaintiff was the focus of a recall campaign, the defendants circulated a personnel report that was written about the plaintiff when she was employed elsewhere. The plaintiff sued, alleging, among other things, defamation. The jury returned a verdict in the plaintiff's favor on the defamation claim. The Court of Appeals reversed, concluding that defamation had not been shown as a matter of law because there was insufficient evidence of actual malice; the court added that the statements in the personnel report were not capable of defamatory meaning. Did the Court of Appeals err in determining that the plaintiff presented insufficient evidence to support a finding of actual malice for purposes of her defamation claim?
Background: In November 2004, Derith Smith was elected township supervisor in Elmwood Township, unseating Noel Flohe. In 2005, an anonymous mailing, with the handwritten caption

"Attention: Suttons Bay Villagers Alledged [sic] Misuse of Village Taxpayer Funds?", went out to hundreds of township residents. This mailing, which was also passed out at township meetings and posted on a township bulletin board, included a disciplinary report alleging wrongdoing during Smith's earlier tenure as Suttons Bay village clerk.

Smith filed a lawsuit that included a claim of defamation against Flohe, township resident Donald Barrows, and former township trustee John Stanek. Smith alleged that the three were responsible for circulating the report; the allegations in the report were false, Smith said, and the defendants defamed her when they circulated it. Smith presented the testimony from the report's author, who acknowledged that the statements in the report were not true; he also stated that he told someone working with the defendants that the statements were not true. The defendants moved to have the trial court dismiss the defamation claim, but the court denied the motion. Smith had presented sufficient evidence that, if believed by a jury, would show that the defendants knowingly participated in the mailing of the report with actual knowledge that it was false or with reckless disregard for the truth, the court said. The court considered defendants' claim that their actions were covered by the fair reporting privilege, MCL 600.2911(3), but held that "there is no privilege to publish a public record which the Defendant knows contains false statements." The case went to trial, and the jury returned a verdict in Smith's favor, awarding non-economic damages of $10,000 against Flohe, $40,000 against Stanek, and $45,000 against Barrows, plus campaign expenses of $4,000 against each defendant. The jury also ordered the defendants to "publish a public apology" to Smith.

The defendants appealed and, in an unpublished per curiam opinion, the Court of Appeals reversed, agreeing with the defendants that defamation could not be established as a matter of law. The appellate panel concluded that, because the report was not prepared by the defendants and because it contained its author's "subjective and erroneous view" of Smith's employment, the defendants could not "be held liable for the reliance on this written memorandum and the failure to investigate the allegations contained within the document d[id] not constitute the reckless disregard that underlies actual malice." The handwritten portion of the copy of the report that was disseminated was "incapable of defamatory meaning" because it was an expression of opinion, the Court of Appeals said. Smith appeals.

Wednesday, March 10
Morning Session

LIGHTHOUSE PLACE DEVELOPMENT, LLC v MOORINGS ASSOCIATION, d/b/a MOORINGS CONDOMINIUM ASSOCIATION, et al. (case no. 139015)
Attorney for plaintiff Lighthouse Place Development, LLC: Stephen A. Hilger/(616) 458-3600
Attorneys for defendant Moorings Association, d/b/a/ Moorings Condominium Association: Noreen L. Slank, Paul R. Bernard/(248) 355-4141
Trial Court: Berrien County Circuit Court
At issue: In the course of settling an earlier lawsuit, the defendant, a condominium association, executed a document that terminated certain easements, including a parking easement established in 1985. The defendant now argues that the 1985 easement was mistakenly listed in the agreement. In 2005, the defendant and the other party to the earlier lawsuit executed an amendment to the settlement agreement, excluding the 1985 easement. But the land upon which the easement ran had been purchased by the plaintiff. When the defendant continued to assert its easement rights, the plaintiff sued to quiet title and for slander of title. The trial court ruled that

the 1985 easement was terminated in the settlement, and that the plaintiff established its claim for slander of title. Did the defendant act on the advice of counsel in authorizing the recording of the 2005 amendment? If so, can plaintiff establish that defendant acted with malice, as is required to establish slander of title?

Background: This lawsuit involves property located near Lake Michigan in New Buffalo, Michigan. The Moorings is a "dockominium" association, whose members own 369 Lake Michigan boat slips. In 1985, The Moorings obtained a parking easement along both side of Oselka Drive, so that it could provide vehicle parking for its members. After the 1985 Agreement was executed and recorded, the property along Oselka Drive was subdivided into parcels, each of which was subject to a portion of the easement created by the 1985 agreement. In 1995, The Moorings and one of the parcel owners, the Harbor Grand, had a disagreement over the nature and extent of The Moorings' easement rights. The Moorings filed a lawsuit, which was settled in 1997. As part of the settlement with the Harbor Grand, The Moorings agreed to terminate certain easements, including the 1985 parking easement.

In 2003, Lighthouse Place Development purchased a parcel of property in order to construct condominiums. Some of the planned development, including relocation of an Amtrak station, encroached on The Moorings' parking easement. The Moorings asserted its easement rights, although the 1997 settlement agreement said that the easement was terminated. The Moorings' attorney reviewed the 1997 agreement and title history of the relevant parcels, and he concluded that the 1985 parking easement had been included in the settlement by mistake. He advised The Moorings to amend the 1997 agreement to correct a "mutual mistake of fact." Accordingly, in 2005, The Moorings and the Harbor Grand executed and recorded an amendment to the 1997 agreement, omitting any reference to the 1985 easement.

Lighthouse Place sued The Moorings, asserting claims for quiet title and slander of title. To establish slander of title, a plaintiff must show falsity, malice, and special damages; in other words, the plaintiff must show that the defendant maliciously published false statements that disparaged a plaintiff's right in property, causing special damages. MCL 565.108; see *B&B Investment Group v Gitler*, 229 Mich App 1, 8 (1998). The trial court granted Lighthouse Place a preliminary injunction, prohibiting The Moorings from asserting the 1985 easement. The Moorings then filed a counterclaim and third-party complaint, bringing Harbor Grand into the litigation and seeking to reform the 1997 agreement. The Moorings continued to inform the city that it intended to pursue its rights under the easement. Lighthouse Place argued that The Moorings' continued statements about the easement violated the preliminary injunction, and the trial court ordered The Moorings to stop discussing its reformation claim with the city. Lighthouse Place then successfully moved for dismissal of The Moorings' claims, including its claim for reformation. At a bench trial, the trial court concluded that the 1985 easement was intentionally and successfully terminated in the 1997 agreement, that The Moorings slandered Lighthouse Place's title, and that Lighthouse Place was justified in suing to quiet title and for slander of title. The court awarded Lighthouse Place damages.

The Moorings appealed; the Court of Appeals affirmed the trial court in a split unpublished per curiam opinion. With regard to the question of slander of title, the majority rejected The Moorings' claim that Lighthouse Place could not establish the element of malice. The panel concluded that The Moorings failed to provide evidence regarding the advice that its attorney had provided to it regarding the 1997 agreement or the 2005 amendment. The dissenting judge concluded that Lighthouse Place had not established the element of malice in its slander of title claim, because The Moorings acted in reliance on the advice of its counsel. The Moorings appeals.

FOSTER v WOLKOWITZ (case no. 139872)
Attorney for plaintiff Leah Rose Foster: Maria Zagorski/(734) 457-2112
Attorney for defendant David Kenneth Wolkowitz: Daniel R. Victor/(248) 646-7177
Trial Court: Monroe County Circuit Court
At issue: The unmarried parties executed an Affidavit of Parentage after their child was born in Michigan, pursuant to the Michigan Acknowledgment of Parentage Act (MAPA). The family moved to Illinois and lived there for a year; the mother then returned to Michigan with the child and sued for custody. The father filed a custody action in Illinois. A Michigan court determined that it had jurisdiction over the case under MAPA; the court awarded the parties joint legal custody and awarded physical custody to the mother. The father appealed, but the Court of Appeals affirmed the lower court. Did the Michigan court properly exercise subject-matter jurisdiction in this interstate child custody dispute? Does the MAPA violate the Equal Protection Clauses of the state and federal constitutions by creating a suspect classification of unmarried fathers who are treated differently than married fathers? If jurisdiction properly lies in Illinois, as the child's "home state" under the Uniform Child Custody Jurisdiction and Enforcement Act, is Michigan the more convenient forum for resolution of this matter?
Background: Leah Rose Foster and David Kenneth Wolkowitz have a daughter, Mila, who was born to them on October 12, 2006 in Michigan, where they had been living since August of that year. Foster and Wolkowitz, who never married, executed an Affidavit of Parentage, pursuant to the Michigan Acknowledgement of Parentage Act (MAPA), MCL 722.1001 *et seq*., naming Wolkowitz as Mila's natural father. The affidavit was filed with the state of Michigan.

When Mila was about six months old, the family returned to Illinois, where they had been living before their move to Michigan. A little more than a year later, Foster returned with Mila to Michigan to live with Foster's parents in Monroe County. Five days later, Foster filed a paternity complaint in the family division of the Monroe Circuit Court; Wolkowitz then filed a custody action in the Cook County Circuit Court in Illinois. The Michigan and Illinois judges, along with the mother and both parties' attorneys, held a telephone conference to discuss jurisdiction. Wolkowitz's counsel argued that, under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), jurisdiction should lie in the child's home state of Illinois. Foster's attorney contended that Michigan should exercise jurisdiction because Mila was then residing with Foster in Michigan, Foster's petition had been filed first, and both Mila and Foster had significant ties to Michigan. It was agreed that an evidentiary hearing should be held in Michigan; Wolkowitz was granted parenting time with Mila in Michigan. After a hearing, the Michigan court determined that "Michigan has jurisdiction to hear this contested custody case on the merits based on the Acknowledgement of Parentage." A custody trial was held in the Michigan court. The parties were awarded joint legal custody of Mila; Foster was awarded physical custody of Mila, while Wolkowitz was awarded parenting time.

Wolkowitz appealed, arguing that the court should have decided the jurisdictional question under UCCJEA and that, under the UCCJEA, the Illinois court had jurisdiction. Wolkowitz also argued that MAPA violated his rights under the Equal Protection clauses of the federal and state constitutions. The Court of Appeals affirmed the trial court's ruling in an unpublished per curiam opinion. With regard to the jurisdictional issue, the Court of Appeals held that, although the trial court relied exclusively on MAPA, it could properly exercise continuing jurisdiction pursuant to UCCJEA. The court found no merit to Wolkowitz's constitutional claim. Wolkowitz appeals.

IN RE ABDULLAH, Minor (case no. 139586)
Prosecuting attorney: Carolyn Breen/(313) 224-5834
Attorney for respondent Rashid Abdullah: Sanford A. Schulman/(313) 963-4740
Trial Court: Wayne County Circuit Court Juvenile Division
At issue: Following an evening of drinking, the then-16-year-old respondent engaged in intercourse with the 20-year-old complainant. The complainant contended that she was intoxicated and had passed out; she also said that she was injured during the encounter. The prosecutor charged the respondent with first-degree criminal sexual conduct, on the theory that the respondent caused injury to a physically helpless individual. Following a bench trial, the trial judge determined that the respondent was responsible for third-degree criminal sexual conduct, for a penetration accomplished by force or coercion. The Court of Appeals vacated the conviction in an unpublished per curiam opinion. Is third-degree criminal sexual conduct a necessarily included lesser offense of first-degree criminal sexual conduct under the theory advanced by the prosecution?
Background: Rashid Abdullah was charged with first-degree criminal sexual conduct, MCL 750.520b(1)(g), based on the theory that Abdullah caused an injury to a mentally incapacitated or physically helpless victim. Abdullah told police that he and the complainant did have sex, but that it was consensual. At trial, the complainant testified that she had passed out in the basement of Abdullah's family's home, following a night of heavy drinking. She said that she woke to find Abdullah, then 16 years old, sexually penetrating her; at the time, she was 20 years old. The complainant testified that she suffered some pain, for which she received medical treatment. Photographs were admitted into evidence showing that the complainant also suffered slight abrasions and bruising. No medical testimony was presented about the complainant's injuries. During closing arguments, the prosecutor asked the trial court to consider, as an alternative to first-degree criminal sexual conduct, finding Abdullah responsible for third-degree criminal sexual conduct. After hearing the evidence, the trial judge found that the complainant was drunk, and therefore unable to consent to intercourse. But, the trial judge noted, no medical testimony had been presented to support a finding that an injury occurred. Accordingly, the trial judge rejected the original charge of first-degree criminal sexual conduct, but found that Abdullah was responsible for third-degree criminal sexual conduct for engaging in sexual penetration accomplished by force or coercion. Abdullah was sentenced to a juvenile facility.

Abdullah appealed to the Court of Appeals, which vacated his conviction in an unpublished per curiam opinion. The Court of Appeals held that, under the facts of this case, third-degree criminal sexual conduct was a cognate lesser offense of first-degree criminal sexual conduct, not a necessarily included lesser offense, citing *People v Nyx*, 479 Mich 112 (2007). As explained in *Nyx*, a lesser offense cannot be considered under MCL 768.32(1) unless it is inferior, which means that the lesser offense must fall within a subset of the elements of the charged greater offense. The Court of Appeals concluded that the trial court erred when it found Abdullah responsible for committing third-degree criminal sexual conduct on a theory involving force and coercion, because the element of "force and coercion" is not an element in the charged offense of first-degree criminal sexual conduct. As a result, Abdullah was not provided with notice of the charges against which he would have to defend, the appellate panel said. The prosecutor appeals.

PEOPLE v MUSHATT (case no. 139413)
Prosecuting attorney: Joseph B. Finnerty/(517) 483-6108
Attorney for defendant Ledell Marvin Mushatt: Michael A. Faraone/(517) 484-5515

Trial Court: Ingham County Circuit Court
At issue: The defendant stole a wallet from within a building, and then fled to the parking lot. While driving away from the scene, he struck a person with his car, causing minor bruising. He then led the police on a short high-speed chase. The defendant was charged with larceny in a building, felonious assault, and fourth-degree fleeing and eluding. He was acquitted of the assault, but convicted of the other two offenses. The trial court scored Offense Variable 3 (physical injury to a victim) to reflect the bruise suffered by the pursuing employee, even though the defendant was acquitted of the assault. The Court of Appeals affirmed. Was OV 3 incorrectly scored because the injury was not part of one of the two offenses for which the defendant was being sentenced?
Background: Ledell Mushatt stole a wallet from an employee's purse in a professional office. He then left the building, went to the parking lot, and got into a car. As he drove away, Mushatt struck a woman with his car. Witnesses informed a nearby police officer, who followed Mushatt in his patrol car. After a brief high-speed pursuit, Mushatt pulled over and was arrested. The stolen wallet was later found in an area where he had been driving. Mushatt was charged with third-degree fleeing and eluding, larceny in a building, and felonious assault. He was acquitted of felonious assault, but convicted of the other offenses. At sentencing, the trial court scored 5 points for Offense Variable 3 (physical injury to a victim) because it concluded that a "bodily injury not requiring medical treatment occurred to a victim." MCL 777.33(1)(e). This was based on the bruise suffered by the bystander who was injured in the parking lot as Mushatt drove away. Mushatt was sentenced as an habitual offender to a prison term of 46 to 180 months on each count, to be served consecutively. Mushatt appealed to the Court of Appeals, which affirmed his convictions and sentences in an unpublished per curiam opinion. The court concluded that, although the injured woman "was not injured by the criminal actions that were the subject of Mushatt's convictions (fleeing and eluding, and larceny), a preponderance of the evidence established that Mushatt committed a criminal act by assaulting her with his car." A trial court determines the sentencing variables by referring to the record, the appeals court explained, using the standard of preponderance of the evidence. Therefore, "even though the jury acquitted Mushatt of the charge of assault because it was not established beyond a reasonable doubt, the sentencing court could determine that an assault occurred for purposes of sentencing." Mushatt appeals.

Afternoon Session

PEOPLE v HERCULES-LOPEZ (case no. 139537)
Prosecuting attorney: Timothy K. McMorrow/(616) 336-3577
Attorney for defendant Marco Antonio Hercules-Lopez: Christine A. Pagac/(313) 256-9833
Trial Court: Kent County Circuit Court
At issue: The Court of Appeals reversed the defendant's convictions of armed robbery, conspiracy to commit armed robbery, and felony-firearm, remanding the case for a new trial. The Court of Appeals held that the defendant was denied counsel at a critical stage of the proceedings because defense counsel was absent from the courtroom when the judge answered the deliberating jury's question about the mental element needed for a conspiracy conviction. The court held that the denial of counsel was structural error that required reversal of the defendant's conviction despite counsel's failure to object. Was the trial court's reinstruction of the jury a critical stage of the proceedings? Is the defendant entitled to a new trial?
Background: Marco Hercules-Lopez participated in the robbery of a grocery store. He had been

acting as a paid police informant, and claimed that he participated in the robbery in order to obtain information for the police about a string of unsolved robberies. Hercules-Lopez identified the other two men involved in the robbery. He admitted that he acted as their lookout, and that he was paid for his participation, but he denied that he conspired with them to participate in the robberies.

At trial, the judge instructed jurors that, to find Hercules-Lopez guilty of the conspiracy charge, they had to find that he agreed with somebody else to commit an armed robbery. The evidence did not have to prove that there was a formal agreement such as "an agreement in so many words or written down," the judge said. Rather, the judge instructed, if "words were uttered that, in fact establish an agreement . . . then there was an agreement . . . it's enough to prove that there was a mutual understanding even if never formally articulated that with someone else that a crime was going to occur." During deliberations, the jury sent a note to the trial judge, asking whether Hercules-Lopez's intent changed any verbal agreement "that he may have made to commit a crime (conspiracy)?" The judge provided the following written response: "If the defendant actually agreed with another to commit a crime, it does not matter why he agreed." Hercules-Lopez's attorney was not present when the judge drafted this written answer for the jury. The jury went on to convict Hercules-Lopez of armed robbery, conspiracy to commit armed robbery, and felony-firearm. Hercules-Lopez was sentenced to 10 to 27 years for the robbery conviction, nine to 27 years for the conspiracy conviction, and a consecutive two-year term for the felony-firearm conviction.

In a split unpublished per curiam opinion, the Court of Appeals reversed Hercules-Lopez's convictions. The Court of Appeals majority held that Hercules-Lopez was entitled to a new trial because the trial court gave the jury a supplemental instruction when Hercules-Lopez's counsel was not present. The majority concluded that the nature of the instruction was substantive and that, as a result, the supplemental instruction amounted to a critical stage of the proceedings. The complete denial of counsel at a critical stage of a criminal proceeding is structural error. In such a case, prejudice is presumed and automatic reversal is required unless the defendant waived his right to have counsel present. The majority stated that, in this case, the record does not indicate that Hercules-Lopez waived his right to have counsel present. Accordingly, the majority concluded, Hercules-Lopez's convictions must be reversed and the case must be remanded for a new trial. The dissenting Court of Appeals judge would have affirmed Hercules-Lopez's convictions. Because the trial judge simply repeated, at the jury's request, specific instructions that had previously been given in counsel's presence, the repetition was not a critical stage of proceedings, the judge said. On these facts, counsel's momentary absence did not prejudice Hercules-Lopez, the dissenting judge concluded. The prosecutor appeals.

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